

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 6  
DALLAS, TEXAS

2018 SEP 20 AM 10:52

REGIONAL HEARING CLERK  
EPA REGION VI

IN THE MATTER OF:

The Dow Chemical Company § Consent Agreement and Final Order  
Freeport, Texas § Docket No. RCRA-06-2018-0935

RESPONDENT  
EPA ID: TXD008092793

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**CONSENT AGREEMENT AND FINAL ORDER**

**I. PRELIMINARY STATEMENT**

1. This Consent Agreement and Final Order (“CAFO”) is entered into by the United States Environmental Protection Agency (“EPA”), Region 6 and The Dow Chemical Company (“Dow” or “Respondent”).
2. Notice of this action has been given to the State of Texas, under the Resource Conservation and Recovery Act (“RCRA”) § 3008(a)(2), 42 U.S.C. § 6928(a)(2).
3. For the purpose of these proceedings, Respondent admits the jurisdictional allegations herein; however, Respondent neither admits nor denies the specific factual allegations and conclusions of law contained in this CAFO.
4. This CAFO states a claim upon which relief may be granted.
5. Respondent explicitly waives any right to contest the allegations and its right to appeal the proposed final order contained in this CAFO, and waives all defenses that have been raised or could have been raised to the claims set forth in the CAFO.
6. This CAFO resolves only those violations alleged in this document.

7. Respondent consents to the issuance of the CAFO hereinafter recited, consents to the assessment and payment of the stated civil penalty in the amount and by the method set out in this CAFO, and consents to the specific stated compliance order.

## **II. JURISDICTION**

8. This CAFO is issued by EPA pursuant to RCRA § 3008(a), 42 U.S.C. § 6928(a), as amended by the Hazardous and Solid Waste Amendments of 1984 and is simultaneously commenced and concluded through the issuance of this CAFO under 40 C.F.R. §§ 22.13(b), 22.18(b)(2)-(3).

9. Respondent agrees to undertake and complete all actions required by the terms and conditions of this CAFO. In any action by the EPA or the United States to enforce the terms of this CAFO, Respondent agrees not to contest the authority or jurisdiction of the EPA to issue or enforce this CAFO, and agrees not to contest the validity of this CAFO or its terms or conditions.

## **III. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

10. Respondent is a Delaware corporation authorized to do business in the State of Texas.

11. Respondent is a “person” within the meaning of RCRA § 1004(15), 42 U.S.C. § 6903(15); and 30 Tex. Admin. Code § 3.2(25) (40 C.F.R. § 260.10)<sup>1</sup>.

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<sup>1</sup> On December 26, 1984, the State of Texas received final authorization for its base Hazardous Waste Management Program (49 FR 48300). Subsequent revisions have been made to the Texas Hazardous Waste Program and authorized by the EPA. Except as otherwise provided, all citations found within this CAFO are to the “EPA-Approved Texas Statutory and Regulatory Requirements Applicable to the Hazardous Waste Management Program” dated November 2014, incorporated by reference under 40 C.F.R. § 272.2201(c)(1)(i) effective on February 26, 2016. 80 Fed. Reg. 80672 (December 28, 2015); 40 C.F.R. 272.2201: Texas State-Administered Program: Final Authorization. References and citations to the “EPA-Approved Texas Statutory and Regulatory Requirements Applicable to the Hazardous Waste Management Program” may vary slightly from the State of Texas’ published version. The corresponding C.F.R. citations are also provided.

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12. Respondent owns and operates a chemical manufacturing complex near Freeport, Texas (“Facility”), consisting of Plant A, Plant B and Oyster Creek Operations.
13. The Facility is a “facility” within the meaning of 30 Tex. Admin. Code § 335.1(61) (40 C.F.R. § 260.10).
14. The primary business at the facility is the manufacturing of specialty chemicals.
15. The Facility is a treatment, storage, and disposal facility operating under Hazardous Waste Permit 50161 issued by the Texas Commission on Environmental Quality (“TCEQ”).
16. The Facility is a large quantity generator of hazardous waste, assigned EPA ID No. TXD008092793.
17. From February 7-16, 2017, inspectors from EPA Region 6, the EPA National Enforcement Investigations Center (NEIC), and contractors from ERG conducted an inspection of the Facility under the authority of Section 3007 of RCRA, 42 U.S.C. § 6927. In support of the inspection, ERG also reviewed information from Dow’s leak detection and repair database.

**Claim 1: Illegal Storage of Hazardous Waste in an Unpermitted Unit**

18. The allegations in Paragraphs 1-17 are realleged and incorporated herein by reference.
19. 30 Tex. Admin. Code § 335.43(a) prohibits the storage of hazardous waste without a permit, except as provided in 30 Tex. Admin. Code § 335.2.
20. On February 15, 2017, NEIC inspectors observed twelve 55-gallon drums labeled “Spent carbon for Recycle” in the Marine area.

21. Dow informed EPA that the spent carbon in these drums was generated from vapor abatement for maintenance on perchloroethylene tank(s) in September of 2015.
22. Sludge from an air pollution control device is a solid waste per 40 C.F.R. § 261.2.
23. On January 12, 2017, Dow obtained analytical test results (TCLP, Method 8260B) indicating that the spent carbon exceeded the regulatory threshold for the characteristic of toxicity for perchloroethylene, rendering the spent carbon a hazardous waste.
24. The drums were shipped as a hazardous waste carrying waste code D039 to Calgon Carbon on April 17, 2017 for treatment in a carbon regeneration unit.
25. Spent carbon destined for reclamation and treated in a thermal treatment unit does not meet the reclamation exemption from solid waste under 40 C.F.R. 261.2(c)(3).
26. Thus, Dow unlawfully stored 12 containers of hazardous waste in an unpermitted unit for a period of approximately 16 months (the 19 months between September of 2015 and April of 2017, less the 90-day accumulation limit for large quantity generators of hazardous waste).

**Claim 2: Failure to Appropriately Label Units in a Hazardous Waste Service**

27. The allegations in Paragraphs 1-17 are realleged and incorporated herein by reference.
28. 30 Tex. Admin. Code § 335.69(a)(1) and (2) require that waste accumulation containers be labeled with the date that the period of accumulation begins and the words "Hazardous Waste."
29. EPA inspectors observed that Dow failed to appropriately mark or label 16 hazardous waste accumulation tanks or containers, as identified during the February 2017 inspection.

30. Respondent's failure to appropriately label these hazardous waste accumulation tanks constitutes a violation of 30 Tex. Admin. Code § 335.69(a)(1) and (2).

**Claim 3: Failure to Inspect a Container Subject to Subpart CC**

31. The allegations in Paragraphs 1-17 are realleged and incorporated herein by reference.

32. EPA inspectors identified Isotainer TRLU 050515-5, located at the B-3300 Environmental Operations area in the container storage area.

33. Due to their size and content (>500ppm volatile organics), these containers are subject to the Level 2 container requirements of 40 C.F.R. § 264 Subpart CC.

34. Condition II.C.2 of TCEQ Hazardous Waste Permit 50161 incorporates the standards of 40 C.F.R. § 264 Subpart CC as enforceable conditions of the permit.

35. According to 40 C.F.R. § 264.1086(d), a container using Container Level 2 controls is “(i) A container that meets the applicable U.S Department of Transportation (DOT) regulations on packaging hazardous materials for transportation as specified in paragraph (f) of this section...”

36. According to 40 C.F.R. § 264.1086(f), “For the purpose of compliance with paragraph (c)(1)(i) or (d)(1)(i) of this section, containers shall be used that meet the applicable U.S. Department of Transportation (DOT) regulations on packaging hazardous materials for transportation as follows: (1) The container meets the applicable requirements specified in 49 C.F.R. Part 178—Specifications for Packaging or 49 C.F.R. Part 179—Specifications for Tank Cars.”

37. Isotainer TRLU 050515-5 is a portable tank as that term is defined in 49 C.F.R.

§ 171.8. The isotainer was manufactured in 2000 and is subject to the specification criteria of IM101.

38. According to 49 C.F.R. § 173.32, the use of a portable tank is prohibited unless the tank has successfully completed the tests or inspections required under 49 C.F.R.

§ 180 Subpart G.

39. According to 49 C.F.R. § 180.605(c), each specification portable tank must be tested and inspected in accordance with the following schedule: (1) Each IM or UN portable tank must be given an initial inspection and test before being placed into service, a periodic inspection and test at least once every 5 years, and an intermediate periodic inspection and test at least every 2.5 years following the initial inspection and the last 5-year periodic inspection and test.

40. The inspection record for isotainer TRLU 050515-5 indicates that the portable tank was due to be inspected in August of 2014. The record indicates that the container was not inspected until June of 2016.

41. Therefore, Dow failed to meet the Level 2 control requirements of 40 C.F.R. § 264 Subpart CC by failing to meet the inspection requirements for portable tanks codified at 49 C.F.R. § 180.605(c).

**Claim 4: Misidentification of Valves Subject to Leak Detection Monitoring**

42. The allegations in Paragraphs 1-17 are realleged and incorporated herein by reference.

43. During its review of the Facility's LDAR records, ERG identified one component (a valve in light liquid service) designated as Difficult to Monitor, but also containing the notation "Accessible with Extension Probe."

44. This component is subject to the Air Emission Standards for Equipment Leaks of 40 C.F.R. § 264 Subpart BB as valves in gas, vapor, or light liquid service.

45. Condition II.C.2 of TCEQ Hazardous Waste Permit 50161 incorporates the standards of 40 C.F.R. § 264 Subpart BB as enforceable conditions of the permit.

46. 40 C.F.R. § 264.1057(h) defines the criteria by which valves may be designated as difficult-to-monitor, and § 264.1057(h)(1) requires that the owner or operator of the valve determine that the valve cannot be monitored without elevating the monitoring personnel more than 2 meters above a support surface.

47. Therefore, Dow misidentified this component as difficult-to-monitor and exempt from monthly monitoring in violation of the requirements of 40 C.F.R. § 264.1057.

#### **IV. COMPLIANCE ORDER**

48. Pursuant to RCRA § 3008(a), 42 U.S.C. § 6928(a), Respondent is hereby ordered to take the following actions:

- i. Within ten (10) business days of the effective date of this CAFO, Dow will perform an audit under the Texas Environmental, Health, and Safety Audit Privilege Act.
- ii. After completion of the active part of this audit, with the sole exceptions of those violations disclosed to and being handled with The Texas Commission on Environmental Quality ("TCEQ"), which shall be timely disclosed to TCEQ by Dow, Dow shall certify that the Facility is operating in compliance

with RCRA and the regulations promulgated thereunder, including, but not limited to, procedures for:

- a. making hazardous waste determinations;
- b. managing hazardous wastes; and
- c. reporting, transporting, and disposing of hazardous waste.

- iii. Within ten (10) business days of closing all of the TCEQ issues, Dow shall certify that all of those violations being handled by TCEQ have been timely closed by Dow.
49. This CAFO does not constitute a waiver of any of EPA's enforcement rights related to violations disclosed pursuant to the audit described in Paragraph 48.
50. In all instances in which this CAFO requires written submission to EPA, the submittal made by Respondent shall be signed by an owner or officer of Respondent and shall include the following certification:

"I certify under the penalty of law that this document and all its attachments were prepared by me or under my direct supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

51. Copies of all documents required by the CAFO shall be sent to the following:

U.S. Environmental Protection Agency  
Compliance Assurance and Enforcement Division  
Waste Enforcement Branch  
Waste Compliance III Section (6EN-H3)  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733  
Attn: John Penland

## V. TERMS OF SETTLEMENT

### A. Penalty Provisions

52. Pursuant to the authority granted in Section 3008 of RCRA, 42 U.S.C. § 6928, and upon consideration of the entire record herein, including the above referenced Findings of Fact and Conclusions of Law, which are hereby adopted and made a part hereof, upon the seriousness of the alleged violations, and Respondent's good faith efforts to comply with the applicable regulations, it is ordered that Respondent be assessed a civil penalty of **five hundred thousand dollars (\$500,000)**.

53. The penalty shall be paid within thirty (30) calendar days of the effective date of this CAFO and made payable to Treasurer, United States of America.

54. The following are Respondent's options for transmitting the penalties: Checks sent via U.S. Postal Mail (including certified mail) or U.S. Postal Service Express Mail should be remitted to:

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

Checks sent via Overnight Mail (non-U.S. Postal Service) should be remitted to:

U.S. Bank  
Government Lockbox 979077  
U.S. EPA Fines and Penalties  
1005 Convention Plaza  
SL-MO-C2-GL  
St. Louis, MO 63101  
314-418-1028

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Wire Transfers should be remitted to:

Federal Reserve Bank of New York  
ABA: 021030004  
Account No. 68010727  
SWIFT address = FRNYUS33  
33 Liberty Street  
New York, NY 10045

The case name and docket number (**In the Matter of The Dow Chemical Company**

**Docket No. RCRA-06-2018-0935**) shall be documented on or within your chosen method of payment to ensure proper credit.

55. The Respondent shall send a simultaneous notice of such payment to the following:

Lorena S. Vaughn  
Regional Hearing Clerk (6RC-D)  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

Mark Potts, Chief  
Waste Enforcement Branch (6EN-H)  
Compliance Assurance and Enforcement Division  
U.S. EPA, Region 6  
1445 Ross Avenue, Suite 1200  
Dallas, TX 75202-2733

Your adherence to this request will ensure proper credit is given when penalties are received by EPA.

56. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 1311, unless otherwise prohibited by law, EPA will assess interest and late payment penalties on outstanding debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest on the civil penalty assessed in this CAFO will begin to accrue on the effective date of the CAFO and will be recovered by EPA on any amount of the civil penalty that is not paid within thirty (30) calendar days of the civil penalty's due date and

will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a). Moreover, the costs of the Agency's administrative handling of overdue debts will be charged and assessed monthly throughout the period the debt is overdue. 40 C.F.R. § 13.11(b). EPA will also assess a fifteen dollar (\$15.00) administrative handling charge for administrative costs on unpaid penalties for the thirty (30) day period after the payment is due and an additional \$15.00 for each subsequent thirty (30) day period the penalty remains unpaid. In addition, a penalty charge of up to six percent (6%) per year will be assessed monthly on any portion of the debt that remains delinquent more than ninety (90) days. 40 C.F.R. § 13.11(b). Should a penalty charge on the debt be required, it shall accrue from the first day payment is delinquent, 40 C.F.R. § 901.9(d). Other penalties for failure to make a payment may also apply.

**B. Costs**

57. Each party shall bear its own costs and attorney's fees. Furthermore, Respondent specifically waives its right to seek reimbursement of its costs and attorney's fees under the Equal Access to Justice Act (5 U.S.C. § 504), as amended by the Small Business Regulatory Enforcement Fairness Act (P.L. 04-121), and any regulations promulgated pursuant to those Acts.

**C. Termination and Satisfaction**

58. In its completion report, respondent shall certify, using the language contained in Paragraph 50, that it has complied with all the requirements of this CAFO, including compliance with the Compliance Order and payment of the civil penalty.

59. Unless EPA Region 6 objects in writing within sixty (60) days of receiving the completion report described in Paragraph 49, this CAFO will terminate sixty (60) days after EPA Region 6 receives Respondent's completion report.

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**D. Effective Date of Settlement**

60. This CAFO shall become effective upon filing with the Regional Hearing Clerk.

**THE UNDERSIGNED PARTIES CONSENT TO THE ENTRY OF THIS  
CONSENT AGREEMENT AND FINAL ORDER:**

FOR THE RESPONDENT:

Date: 9-13-18

  
Fran Falcon  
Texas Regional Environmental Leader  
The Dow Chemical Company

FOR THE COMPLAINANT:

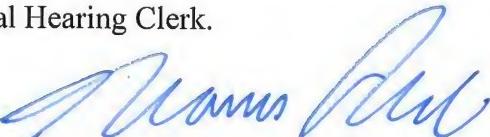
Date: 9-18-18

  
Cheryl T. Seager  
Director  
Compliance Assurance and  
Enforcement Division

**FINAL ORDER**

Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22, the foregoing CAFO is hereby ratified. This Final Order shall not in any case affect the right of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. This Final Order shall resolve only those causes of action alleged herein. Nothing in this Final Order shall be construed to waive, extinguish or otherwise affect Respondent's (or its officers, agents, servants, employees, successors, or assigns) obligation to comply with all applicable federal, state, and local statutes and regulations, including the regulations that were the subject of this action. Respondent is ordered to comply with the terms of settlement and the civil penalty payment instructions as set forth in the CAFO. Pursuant to 40 C.F.R. § 22.31(b) this Final Order shall become effective upon filing with the Regional Hearing Clerk.

Date: 9/20/18

  
\_\_\_\_\_  
Regional Judicial Officer

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 20<sup>th</sup> day of Sept., 2018, the original of the foregoing Consent Agreement and Final Order was hand delivered to the Regional Hearing Clerk, U.S. EPA, Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, and that a true and correct copy of the CAFO was sent to the following by the method below:

**CERTIFIED MAIL – RETURN RECEIPT**

**REQUESTED** 7014015000024548966

Paul Bork  
Operations Legal  
The Dow Chemical Company  
332 Highway 332 East  
Lake Jackson, TX 77566

Lori Jackson  
Ms. Lori Jackson  
Paralegal